IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 418 of 2006
With
CIVIL APPLICATION No. 3279 of 2006

For Approval and Signature:

HONOURABLE THE ACTING CHIEF JUSTICE Y.R.MEENA Sd/-
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HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT STATE MARKETING FEDERATION LTD. - Appellant(s)
Versus
SABARKANTHA DISTRICT CO OP. PURCHASE & SALES UNION LTD. - Respondent(s)

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Appearance :
MR BS PATEL for Appellant(s) : 1,MRS RANJAN B PATEL for Appellant(s) : 1,
MS NAYANA M PATEL for Respondent(s) : 1,

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CORAM : HONOURABLE THE ACTING CHIEF JUSTICE Y.R.MEENA
and
HONOURABLE MR.JUSTICE D.A.MEHTA

Date : 26/04/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 This Appeal has been preferred by the original petitioner against the judgment and order dated 14.12.2005 passed by the learned Single Judge in Special Civil Application No.15669 of 2005.

2 It is the say of the appellant-petitioner that a sum of Rs.1,49,76,463.91 was outstanding as on 1.4.1996 from the respondents. On 22.3.1999 a sum of Rs.13,48,296.98 was paid by the respondent and hence a sum of Rs.1,36,28,167.30 was due to the petitioner. The petitioner filed a Summary Suit before the Board of Nominees at Ahmedabad, under section 99(4) of the Cooperative Societies Act,1961 (the Act). The same was numbered as Lavad Summary Suit No. 731 of 2001. The respondent moved an application for leave to defend on 7.7.2001. On 24.10.2001 the Board of Nominees granted leave to defend upon condition that the respondent deposits an amount of Rs.1 crore with the petitioner within a period of 25 days. The respondent went in Revision Application against the said order before the Gujarat State Cooperative Tribunal (the Tribunal). On 14.6.2002 the said Revision

Application bearing No.468 of 2001 came to be dismissed in absence of the Advocate of the respondent. On 28.6.2002 the Board of Nominees made the award as the condition of deposit had not been complied with by the respondent. Being aggrieved by the award dated 28.6.2002 the respondent preferred Appeal No.618 of 2002 before the Tribunal and sought stay of execution of the award. On 12.8.2002 the Tribunal granted stay as prayed for subject to the respondent depositing a sum of Rs. 5 lacs. Thereafter, though there were various proceedings between the parties, for the present it is not necessary to make a reference to the same. Suffice it to state that on 21.7.2005 Appeal No.618 of 2002 filed by the respondent came to be allowed by the Tribunal setting aside the award of the Board of Nominees and the suit was remanded to the Board of Nominees. The petitioner thereupon preferred Special Civil Application No. 15669 of 2005 which came to be rejected by the learned Single Judge vide impugned judgment and order dated 4.12.2005.

3 On 12.4.2006 when the Appeal came up for hearing the learned Advocate appearing on Caveat raised a preliminary objection as to maintainability of the appeal and hence, the parties were heard at length on the said issue.

4 On behalf of the petitioner it was submitted that considering the provisions of Rule 78 of the Gujarat Cooperative Societies Rules, 1965 the High Court cannot exercise powers of superintendence under Article 227 of the Constitution of India and therefore, the impugned judgment of the learned Single Judge has to be treated as being under Article 226 of the Constitution of India. That the learned Single Judge having considered the merits of the case, the petition has been treated as a petition under Article 226 of the Constitution of India. In support of the proposition reliance has been placed on the following decisions :

[1] 1986(Supp.)SCC 401 – Umaji Keshao Meshram And Ors. Vs. Radhikabhai widow of Anandrao Banapurkar & Another.

[2] 36(1)GLR 110 F.B. Dilavarsinh Khodubha vs. State of Gujarat & Ors.

[3] 1998(2) GLH 44 – Mohanbhai Ramjibhai vs. Dy.Executive Engineer.

[4] 2004(3) GLH 452 – State of Gujarat Vs. Sankalchand P.Vachheta.

[5] 2003(1) GLR 537 – Ishwarbhai Narottambhai Patel Vs. K.H.Trivedi & Ors.

[6] 2003(3) GLR 1878 – Ishwarbhai Narottambhai Patel Vs. K.H.Trivedi & Ors.

[7] Order dated 1.4.2005 in LPA No.604 of 2003 in SCA No. 476 of 1993 – Durlabhbhai Prabhubhai Patel Vs. Director (Sugar).

5 Opposing the maintainability of the Appeal it was submitted on behalf of the respondent that where the Court has exercised jurisdiction under Article 227 no intra Court appeal is maintainable under clause 15 of the Letters Patent. For this, reliance has been placed on the following three decisions :

[1] Ishwarbhai Narottambhai Vs. K.H.Trivedi, 2003(3) GLR 1878, paragraph 12.
[2] State of Gujarat Vs. Deenanji Vidhaji Thakore, 2003 (2) GLH 420, paragraph 4.
[3] Sabarmati Reti Udyog Kamgar Sahakari Mandali Vs. State of Gujarat, 2006(1) GLH 347, paragraph 4.

Further submissions have also been made on the difference in scope of Articles 226 & 227 of the Constitution.

6 In the aforesaid backdrop the preliminary issue requires to be determined at the outset. In the cause title of the petition the petitioner has described the petitioner as being under Article 226 of the Constitution of India. However, when one proceeds to the impugned judgment of the learned Single Judge it has categorically been observed in paragraph No. 7 of the impugned judgment :-

"I see no reason to entertain the present petition in exercise of jurisdiction under Article 227 of the Constitution of India at this stage (because, the case is

remanded by the Tribunal to the Board of Nominees, Ahmedabad) especially for the following facts and reasons:"

7 Though the learned Advocate for the petitioner has made submission that there is dichotomy in the expression of views by two Division Benches of this Court in the decision rendered in case of *Ishwarbhai Narottambhai Patel* (Supra) decided on 24.6.2003 and *State of Gujarat Vs. Sakalchand P. Vachheta* (Supra) decided on 29.7.2004 it is not possible to accept the said submission for the reasons that follow.

8 In the subsequent decision in case of *State Vs. Sakalchand P.Vachheta* the Division Bench has, after narrating the facts of the case in the main petition and the review petition, reproduced in paragraph No. 14 of its judgment the principles enunciated by the Division Bench of this Court in the case of *Ishwarbhai Narottambhai Patel* (Supra) and has not drawn any distinction. In paragraph No.15 of the judgment it is specifically stated that " *From the peculiar facts of all the cases it is clear that Letters Patent Appeals were very much maintainable before this Court".* Therefore, it is apparent that not only is there no conflict between two decisions rendered by two different Benches of this Court, but in the subsequent decision the Division Bench has after reiterating

the principles set out in the earlier decision proceeded to entertain the appeal in light of the peculiar facts of the case before it.

9 In the case of *Kanhaiyalal Agrawal Vs. Gwalior Sugar Co.Ltd., (2001) 9 SCC 609* the Apex Court has stated thus, after referring to its earlier decision in case of *Lokmat Newspaper (P) Ltd. Vs. Shankar Prasad, 1999 (6) SCC 275* laid down :

> *"that if a Single Judge exercises jurisdiction under Art.226, Letters Patent Appeal would be maintainable but if the jurisdiction is exercised under Art. 227 it will not be maintainable. But with an explanation that if the Single Judge of the High Court in considering the petition under Art.226 or Art. 227 does not state under which provision he had decided the matter and where the facts justify filing of petition both under Art.226 and Art.227 and a petition so filed is dismissed by the Single Judge on merits, the matter may be considered in its proper perspective in an appeal".*

This decision has been taken to be the basis by this Court while deciding the case of *Ishwarbhai Narottambhai Patel* (Supra) and thereafter, after setting out the provisions of clause 15 of the Letters Patent principles have been culled out and summarised in paragraph

No.12 of the judgment.

10 In sum and substance, the essence of the settled legal position is: where the learned Single Judge has not stated whether he has exercised jurisdiction under Art. 226 or Art. 227 of the Constitution it would become relevant to examine the proceedings in question – namely, whether the challenge is by way of original proceedings or where the challenge is to the decision of the Tribunal. In case of former, the proceedings in original being under challenge the petition would obviously be under Article 226 of the Constitution . However, in case of the latter, namely where the decision of a Tribunal is challenged, where a doubt arises, further inquiry has to be undertaken to determine the character of the authority i. e. the Tribunal – whether the Tribunal is empowered to exercise any powers of adjudication and whether such powers have been conferred on the Tribunal by any statute or statutory rules.

11 However, such inquiries would be required provided the learned Single Judge has not stated under which provision he has decided the matter and where the facts justified filing of the petition both under Articles 226 and 227 of the Constitution and the petition has been

decided on merits. But in a case where the jurisdiction is exercised under Article 227 of the Constitution the Letters Patent Appeal is not maintainable.

12 As already noticed hereinbefore in paragraph No. 7 of the impugned judgment the learned Single Judge has categorically stated that the petition is not entertained in exercise of jurisdiction under Article 227 of the Constitution of India because the case is remanded by the Tribunal to the Board of Nominees. The subsequent discussion which follows in the impugned judgment is only with a view to ascertain as to whether the approach of the Tribunal is in accordance with law and this becomes clear from the following expression in sub-paragraph No.(iii) of paragraph No.7 " *xxx xxx xxx I am of the opinion that the conclusion arrived at by the Tribunal vide order dated 27/07/2005 is absolutely true, correct, legal and in consonance of the facts of the case."*

13 In these circumstances, no inquiry is called for regarding the nature of powers available to the Tribunal. Hence, in light of the settled position of law merely labeling the writ petition under Article 226 of the Constitution will not bring the petition under the purview of Article 226 of the Constitution. Once the learned Single Judge has actually passed

an order by exercising powers under Article 227 of the Constitution then no Letters Patent Appeal is maintainable.

14 In light of the foregoing discussion preliminary objection raised on behalf of the respondent merits acceptance. This Appeal is not maintainable as the impugned judgment of the learned Single Judge is in exercise of jurisdiction under Article 227 of the Constitution. The Appeal is accordingly dismissed summarily without entering into the merits of the matter.

CIVIL APPLICATION No. 3279 of 2006.

In light of the order made in the main Appeal this Civil Application having become infructuous is rejected as such.

Sd/-
(Y.R.MEENA, Actg. C.J)

Sd/-
(D.A.MEHTA, J)

m.m.bhatt